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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1951

No. 520

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Appellant,

vs.

DIRECTOR, DIVISION OF TAX APPEALS OF DEPARTMENT OF TREASURY OF STATE OF NEW JERSEY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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vs.

DIRECTOR, DIVISION OF TAX APPEALS OF DEPARTMENT OF TREASURY OF STATE OF NEW JERSEY,

Appellee

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

STATEMENT OF APPELLEE, STATE OF NEW JERSEY, MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES TO REVIEW ON APPEAL, THE JUDGMENT IN QUESTION, INCLUDING APPELLEE'S MOTION TO DISMISS THE APPEAL OR AFFIRM THE JUDGMENT.

The Appellee, State of New Jersey, believing that the matters set forth below will demonstrate the lack of jurisdiction of the Supreme Court and the lack of substance in the questions raised by this appeal, files this, its statement

in opposition to Appellant's statement as to jurisdiction. Appellee includes herein its motion to dismiss the appeal for lack of jurisdiction, or in the alternative to affirm the judgment of the Supreme Court of New Jersey on the ground that the questions raised by the Appellant are so unsubstantial as not to need further argument.

The Appellant seeks a review of a judgment of the Supreme Court of New Jersey on direct appeal from that Court. Appellee respectfully asserts that jurisdiction to hear such appeal is lacking under the statute and, furthermore, that the grounds stated by the Appellant appear on the face of the record to be so unsubstantial as to warrant the Court in summarily disposing of the appeal at this stage of the proceeding.

The matters relied upon by Appellee are more particularly stated below:

1. Matters and Grounds Making Against Jurisdiction

The Appellant, a New Jersey corporation, operating a railroad in New Jersey, owned and used Class I ("main stem") and Class III ("tangible personal property") properties for railroad purposes in the said State during the years in question of the following value:

Year	Class I Property	Class III Property	Total Class I and Class III	
1948.....	$32,133,136	$11,831,934	$43,965,070	(A 9a-28)
1949.....	32,179,007	9,058,234	41,237,241	(A 19a-20)
1950.....	32,233,651	8,997,541	41,231,192	(A 30a-25)

The "main stem" is the roadbed, tracks, appurtenances, ballast and structures as defined in N. J. S. A. 54:29A-2 (Appendix A, p. 23). "Tangible personalty" includes the rolling stock, cars, locomotives, machinery and the like as defined by the said N.J.S.A. 54:29A-2 (Appendix A, p. 23), with the limitation that tangible personal property that is kept but a part of the time in New Jersey shall only be

assessed a proportionate part of its value (N. J. S. A. 54:29A-9; Appendix A, p. 25).

Prior to 1941, a straight property tax was levied on Class I and Class III property used for railroad purposes in this State (N. J. S. A. 54:21-1; Appendix A, p. 21). The money so raised was applied to the uses of the State (N. J. S. A. 54:24-6; Appendix A, p. 23), while the entire amount of the tax derived from Class II property as defined in N. J. S. A. 54:22-1 (Appendix A, p. 21) was allotted to the local taxing districts (N. J. S. A. 54:24-11, Appendix A, p. 23). The said Class I and Class III property was computed at the "average rate of taxation" in the State, which rate was determined by dividing the aggregate taxes by the aggregate value of general property in the State (N. J. S. A. 54:24-2 and 3, App. A, p. 22). This method of determining the tax rate was sustained in *Central Railroad Company of New Jersey* v. *State Tax Dept.*, 112 N. J. L. 5 (E. and A. 1933), cert. den. 293 U. S. 568 (1934).

The "average rate of taxation" for each of the years in question was (Ex. S-17; R. 182a):

1948 — 5.904%
1949 — 6.139%
1950 — 6.201%

A straight property tax upon Class I and Class III property for such years at the average rate of taxation would have yielded the following amounts for state uses:

Year	Class I Tax	Class III Tax	Total Class I and Class III Tax
1948	$1,897,140.35	$698,557.38	$2,595,679.73
1949	1,975,469.24	556,084.98	2,531,554.22
1950	1,998,808.70	557,937.52	2,556,746.22

Such method of taxing property used for railroad purposes in this state was sustained in *Central Railroad Company of New Jersey* v. *Thayer Martin*, 114 N. J. L. 69 (Sup. Ct.

1934); *Lehigh Valley Railroad Company* v. *Martin*, 100 Fed. Rep. 2nd 139 cert. den. the present appellant 306 U. S. 651 rehear. den. 306 U. S. 670 (1939); and *Central Railroad Company of New Jersey*, 115 Fed. Rep. 2nd 968, cert. den. 313 U. S. 568 (April 1941), the Circuit Court citing *Nashville, C. & St. L. Ry. Co.* v. *Browning*, 310 U. S. 362, 370 (1940).

During such litigation, the several railroad companies had urged that earnings should be considered in determining the tax burden to be borne by the railroads operating in this State. (See comment of the Court in *Lehigh Valley* v. *Martin, supra*, at page 142, and *Central Railroad* v. *Martin, supra*, 115 F. 2nd at page 971).

On July 21, 1941, just a few months after the final determination of the last mentioned case, the New Jersey Legislature devised a new method for taxing property used for railroad purposes in this State. Commenting upon this new method, the highest court in New Jersey said in *Norton* v. *State Board*, 134 N.J.L. 57, 58, (E. and A. 1946):

> "The tax levied on railroad property had been for years in litigation and large amounts of these taxes were in default. In 1941 a new method of taxing such property was enacted, Pamph. L. 1941, ch. 291. This act was amended the following year by Pamph. L. 1942, ch. 169 (R.S. 54:29A-1 et seq.). These laws in substance, provide a combination property tax and franchise excise tax computed in a given year on the basis of the net operating income of a railroad system for the preceding calendar year."

And at page 59:

> "The new system was devised to provide some measure of tax relief for the railroads in poor earning years while providing for a greater return to the State in times of high earnings."

In short, the Legislature sought to give weight to the earning experience of the respective railroads in determining the share of the tax burden to be borne by them. But the new act was always intended to be a revision of the former straight property tax (N.J.S.A. 54:29A-74 App. A, p. 24) and the new combination tax a new method of taxing property used for railroad purposes, based upon the earning experience of the entire railroad system, as defined in N.J.S.A. 54:29A-2 (App. A, p. 23), which is used in conjunction with the New Jersey properties.

Because the New Jersey Legislature applied the new method also to Class II (local use) properties, the "railroad tax law of 1941" was vigorously attacked as unconstitutional by the City of Jersey City. The new method was just as vigorously defended by the principal railroads operating in New Jersey. The 1941 tax law was declared to be constitutional in its entirety in *Jersey City* v. *State Board*, 134 N.J.L. 239 (E and A 1946), modifying 133 N.J.L. 202 (Sup. Ct. 1945) wherein the new law had been found to be unconstitutional for the year 1941.

In 1947, a new Constitution was adopted in New Jersey, which provides in part in Article VIII, sect. I, par. 1, as follows:

> "* * * All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value; and such real property shall be taxed at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district."

This provision of the new Constitution required that the "railroad tax law of 1941" be amended in order to provide again for a straight property tax at the local general rate on Class II (local use) property. But this meant that

the taxes on such Class II property would be substantially increased and the railroad companies immediately sought tax relief by a further reduction in Class I and Class III taxes.

The Legislature amended the tax law to provide for a straight property tax at the local rate on Class II (local use) property but by "the railroad tax law of 1948", provision was made for much lower taxes on Class I and Class III properties so that in effect, the State absorbed at the State level a great part of the increased amount of taxes caused by the change in the Constitution.

Exhibit S-15 (R. 178a) shows how this Appellant benefited in the years 1948 and 1949 by reductions made in the State level taxes of the Appellant. Thus the total amount of taxes received from the Appellant for State uses was $966,949.58 less in 1948 than such taxes would have been if the State had continued to collect for State uses the amounts required by the "railroad tax law of 1941" before the amendments of 1948; for 1949 the reduction was $1,405,761.97.

The total assessments made against this Appellant under the "tax law of 1948" were as follows:

Year	Class I and Class III Property Tax	Franchise Tax	Total Tax	Percent of Tax to Property Valuation
1948.....	$438,482.52	$213,228.10	$651,710.62	1.48%
1949.....	446,984.23	435,436.50	882,420.73	2.14%
1950.....	472,157.28	254,556.40	726,713.68	1.76%
3 Year Total....	$1,357,624.03	$903,221.00	$2,260,845.03	1.788%
3 Year Average..	452,541.34	301,073.67	753,615.01	1.788%

Thus for the privilege of owning and operating the main line of its railroad through the very heart of the metropolitan district of northern New Jersey, this Appellant is asked to pay total taxes upon essential property at the rate of less than 2%. This is far below the amount

which the State could reasonably have collected under its straight property tax at the "average rate of taxation". In fact the total amount collected in the three years under review was less by some $300,000. than would have been collected at the "average rate of taxation" in any one of the three years 1948 to 1950.

The State of New Jersey respectfully submits that such a modest tax upon some $42,000,000. worth of property used for railroad purposes in this State cannot reasonably be open to attack as violative of the Federal Constitution and the reasons and argument advanced by the Appellant are so completely devoid of substance as to require this Court to dispose of this matter summarily on this motion.

A. There Are No Federal Questions

The Supreme Court is without jurisdiction of an appeal under 28 U.S.C.A. 1257 (2) unless there was "drawn in question" before the Supreme Court of New Jersey the validity of the state statute under review. The opinion of the Court below shows that Appellant did not claim that the statute violates the Federal Constitution. Rather the Appellant questioned the construction and application thereof by the Division of Tax Appeals.

But if this were not so clear upon the record, the Appellant's assignment of errors and statement as to jurisdiction, including statement of questions involved, disclose that the Appellant is still complaining of the construction placed upon the railroad tax law by the New Jersey Supreme Court. The Appellant no where says forthrightly that the New Jersey statute is unconstitutional. The Appellant's approach is exactly the same as in *Central Railroad Company* v. *Division of Tax Appeals*, 3 N.J. 27 (1949), appeal dismissed, 338 U.S. 946 (1950).

In *Charleston Fed. Sav. & L. Asso.* v. *Anderson*, 324 U.S. 182, 187 (1945), this Court said:

> "Appellants in their assignment of errors in this Court have failed to attack the state statute as repugnant to the Constitution, stating only that the finding and judgment below sustaining the assessment violate the equal protection clause. Even where the federal question has been properly raised below, an appeal under § 237 (a) may be dismissed where appellants fail to attack a statute explicitly in their assignments of error here."

The Appellant in its reply brief below said (Arb 28-5):

> "The Attorney General makes the point that from the standpoint of affording transportation service to the public, CNJ and CRP are operated as "a single utility for furnishing transportation service" (Rb 43-20). As we have already pointed out in this brief (p. 2) this is not disputed. Indeed, so far as we know, there is no fact material to this case which is in dispute—all of the facts being matters of record."

It would therefore seem that it is not necessary at this time to call attention to the many decisions of this Court holding that the findings of the State Court on matters of fact are conclusive. We therefore accept the findings of the Division of Tax Appeals (A 46a-12) and the Supreme Court of New Jersey (opinion p. 8) as to such facts.

And so with respect to the construction placed upon the "railroad tax law of 1948" by the highest Court in the State of New Jersey. In *Aero Mayflower Transit Co.* v. *Board of R.R. Com.*, 332 U.S. 495, 499 (1947) it was said:

> "We put aside at the start appellant's suggestion that the Supreme Court of Montana has misconstrued the state statutes and therefore that we should consider them, for purposes of our limited function,

according to appellant's view of their literal import. The rule is too well settled to permit of question that this Court not only accepts but is bound by the construction given to state statutes by state courts."

The Appellant cannot successfully maintain that the construction below is not correct.

The Appellant does not seriously challenge the constitutionality of the "railroad tax law of 1948" but seeks only a construction more favorable to itself. This is clearly shown by the conduct of the Appellant during the passage of the amendments to the railroad tax law in 1948. While the proposed amendments to the railroad tax law were in the course of preparation in 1948, the State Tax Policy Commission prepared a schedule of the return anticipated from the application of the proposed new formula (Exh. S-27; R. 190a). The Associated Railroads of New Jersey, including the Appellant (R. 66a-18). submitted a counter proposal designed to absorb at the State level the tax increase on Class II (local use) railroad property made necessary by the 1947 Constitution. (Ex. S-14; R. 176a).

The figures submitted in Exhibit S-27 of anticipated return from the Appellant were calculated on the basis of the State's construction of the tax law. It was testified for the State (R. 84a-23) and not denied that counter figures submitted on behalf of the Appellant and shown on Exhibit S-14, could not possibly have been realized without levying the tax against the Appellant on the basis of the construction claimed by the State.

It is clear why the Appellant acted in the manner it did when the proposed amendments to the railroad tax law were in the course of passage in 1948. The reductions proposed by the tax policy committee were very substantial and the Appellant wished to do nothing to

jeopardize the proposed tax program. It wanted the benefit of the reductions in Class I and Class III taxes as shown on Exhibit S-15.

It is equally clear why Appellant has not seen fit to state specifically at this time that the "railroad tax law of 1948" is unconstitutional. The Appellant does not wish to return to a straight property tax basis. And this is understandable. As has been shown, prior to 1948, the State levied a combination property and franchise tax, the property tax at the rate of 3% and the franchise tax at a minimum of 15% of the next preceding year net railway operating income. The Legislature could have left the property tax at 3% and given up the franchise tax, representing a very substantial reduction. The State can still return to a straight 3% tax which, as has been shown above, is less than one half of the "average rate of taxation". At a 3% rate, the tax on Class I and Class III property of this Appellant having a value of $42,000,000, the approximate average valuation for each of the years in question would amount to $1,260,000. This is more than $500,000. in excess of the average total tax for State uses actually levied for each of those years. The Appellee respectfully submits that the Appellant does not seriously challenge the constitutionality of the method presently used for determining the tax liability of the railroad companies using property for railroad purposes in this State.

But even were the Appellant explicitly challenging the validity of the "railroad tax law of 1948", the questions presented are so unsubstantial as to require the Supreme Court to dispose of the matter summarily by dismissing the appeal or affirming the judgment.

B. No Substantial Federal Question Is Raised

The presence of a substantial Federal question is essential to invoke the jurisdiction of this Court. If the ques-

tions presented are plainly unsubstantial, this Court will not take jurisdiction; *Levering and Garrigues Co.* v. *Morrin*, 289 U.S. 103, 105 (1933). A claim of unconstitutionality is unsubstantial where it is "obviously without merit", or "its unsoundness so clearly results from previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Levering and Garrigues Co.* v. *Morrin, supra; Ex parte Poresky*, 290 U.S. 30, 32 (1933).

As shown above, New Jersey's highest Court construed the "railroad tax law of 1941" in *Norton, Trustee*, v. *State Board, supra* (1946). After passage of the 1948 amendments the new Supreme Court again construed the railroad tax law in *Central Railroad Co.* v. *Division of Tax Appeals, supra*, and the companion *Delaware, Lackawanna and Western Railroad* case. The Court reaffirmed the *Norton* case and said at page 37 (3 N.J. 27) with reference to the 1948 amendments:

> "Under such circumstances it must be assumed the Legislature acted with the judicial definition in mind."

In the instant case, the Court below, at page 3 of its opinion, reaffirmed what had been said in the *Norton* and *Delaware, Lackaawnna and Western* cases.

The railroad tax law provides (N.J.S.A. 54:29A-11):

> "Taxes assessed pursuant to this act shall be in lieu of all other State or local taxation of or measured by property taxable hereunder, other than assessments for benefits."

N.J.S.A. 54:29A-74 (App. A, p. 27) provides that the present railroad tax law is a revision of the earlier straight property tax law. Thus no tax can be levied upon any of the Class I and Class III property by the municipalities in which the property may be located.

The Appellant has pointed to no case which supports the contention that a combination property and franchise tax, which is but a small proportion of a former straight property tax, is violative of the Federal Constitution.

(1) Due Process of Law

In support of its argument, Appellant has cited *Norfolk and Western Railway Co.* v. *North Carolina*, 297 U. S. 682 (1936). In sustaining the tax, this Court said at page 688:

> "A finding that the statute, though fair upon its face, is oppressive toward the railway in its practical operation cannot rest upon so fragmentary and partial a showing of facts. We must bear in mind steadily that the burden is on the taxpayer to make oppression manifest by clear and cogent evidence."

The State respectfully submits that a tax at the rate of 1.788% on $42,000,000. worth of railroad property giving access to the New York Harbor area could not reasonably be said to be oppressive of the Appellant.

But, it may be asked, could the rate become oppressive under the statutory formula? Could the rate conceivably be higher than the "average tax rate"? The answer is unqualifiedly—No! As has been shown above the tax on the Class I and Class III property in question for the year 1948 at the "average rate of taxation" would have been $2,595,679. The combination tax actually levied was $651,710.62, a reduction of $1,943,969.

To receive an additional $1,943,969 in franchise tax, the net operating income allocated to New Jersey must be an additional $19,439,690. The allocation percentage is 67% so that to pay such additional tax Appellant must earn additional net railway operating income of over $29,000,000 after all Federal income taxes have been paid. In order to earn an additional $29,000,000 the company would be re-

quired to pay additional Federal income taxes of over $31,000,000. Thus there would have to be a sum of over $60,000,000 after payment of all operating costs except Federal income taxes in order for the tax liability of the Appellant on Class I and Class III property to even approach the old straight property tax liability. When we consider that the total combined railway operating revenues, before payment of any costs, was under $56,000,000 for 1947 (Ex. CR-10, A 264a-3 plus Ex. CR-13, A 288a-3) and under $64,000,000 for 1948 (Ex. CR-11, A 276a-3 plus CR-14, A 301a-3), net railway operating income of over $60,000,000 before Federal income taxes but after all other costs of operation would appear fantastic. The amount levied by the new tax formula for Class I and Class III taxes can never even approach the amount levied under the old straight property tax at the local rate.

The Appellant has also cited *Southern Railway Co.* v. *Kentucky*, 274 U.S. 76 (1927) and *Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U.S. 123 (1931). Neither are in point because neither involves a situation where the valuable property of the tax payer is located in the taxing State. In the *Southern Railway* case, this Court said:

> "* * * where property is part of a system and has its use only in conjunction with other parts of the system, that fact may be considered even though parts of the system are outside the State."

In our case, the State seeks to tax only the part of the system in the State of New Jersey. As a measure of the rate that property must pay, the operating income is used.

The New Jersey statute provides that, in computing the tax the net operating income shall be allocated according to track mileage (N.J.S.A. 54:29A-14, App. A p. 25); *Pittsburgh, C.C. & St. L.* v. *Backus*, 154 U.S. 421, 430, 431 (1894) fully supports such method of allocation.

The great value of the New Jersey railroad properties as the gateway to the New York Harbor has been repeatedly recognized. The Interstate Commerce Commission recognized it in the instant case (Exh. CR-8, A 243a-32). The New Jersey Legislature would have been fully justified in insisting upon added weight being given to such properties because of strategic location. Such course was given approval in *Fargo* v. *Hart*, 193 U.S. 490, 500 (1904); *Cleveland etc. R. Co.* v. *Backus*, 154 U.S. 439, 443 (1894); and *Wallace* v. *Hines*, 253 U.S. 66, 69 (1920).

New Jersey has indeed been modest in its demands upon the Appellant by reason of its ownership and use of valuable Class I and Class III property in this State. It may not reasonably be said that the Appellant has been denied due process under the facts and circumstances of this case.

(2) Commerce Clause

To support its contention that the construction placed upon the "railroad tax law of 1948" violates the commerce clause of the Federal Constitution, the Appellant has cited eight cases. Not one of those cases presented a situation where the tax levied was in substitution of a much higher property tax.

Typical of the cases cited were *Adams Mfg. Co.* v. *Storen*, 304 U.S. 307, 310 (1938), wherein this Court said:

> "It is not a tax in lieu of ad valorem taxes upon property which would be inoffensive to the Commerce clause."

and *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 438 (1939) wherein this Court said:

> "It has often been recognized that 'even interstate business must pay its way' by bearing its share of the local tax burden * * * and that in consequence not every local tax laid upon gross receipts derived from participation in interstate commerce is forbidden.",

and *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 609 (1950); wherein the Court said:

> "The State is not precluded from imposing taxes upon other activities or aspects of this business which, unlike the privilege of doing interstate business are subject to the sovereign power of the State. Those taxes may be imposed although their payment may come out of the funds derived from petitioner's interstate business provided the taxes are so imposed that their burden will be reasonably related to the powers of the State and nondiscriminatory."

and *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653 (1948) which case was cited by this Court in dismissing the appeal of this Appellant in *Central Railroad Co.* v. *Division of Tax Appeals*, 338 U. S. 946 (1950).

In *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688, 700 (1895), this Court said:

> "In the case before us, the tax was graduated according to the amount and value of the property measured by miles, and was in lieu of taxes levied directly on the property. In marking the distinction between the power over commerce and municipal power, literal adherence to particular nomenclature should not be allowed to control construction in arriving at the true intention and effect of state legislation. We are of opinion that it was within the power of the State to levy a charge upon this company in the form of a franchise tax but arrived at with reference to the value of its property within the State and in lieu of all other taxes, and that the exercise of that power by this statute, as expounded by the highest judicial tribunal of the State in the language we have quoted, did not amount to a regulation of the interstate commerce or put an unconstitutional restraint thereon."

The *Postal Telegraph* case was cited in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 254 (1937) wherein this Court said:

> "It was not the purpose of the Commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business".

and in *Adams Mfg. Co.* v. *Storen*, *supra*, where the Court said (p. 310):

> "It is not a tax in lieu of ad valorem taxes upon property which would be inoffensive to the Commerce clause",

and in *Illinois Central R. Co.* v. *Minnesota*, 309 U. S. 157, 161 (1940), wherein the Court said:

> "To hold the net cannot constitutionally be taxed by Minnesota but must be reduced by the amount of payments made by Appellant for its use of cars in other states would be to deprive Minnesota of her jurisdiction over property within her borders",

and in *Joseph* v. *Carter and Weekes, S. Co.*, 330 U. S. 422, 427 (1946) wherein this Court said that an unapportioned tax on gross proceeds from interstate commerce was violative of the Commerce clause

> "Where the taxes were not in lieu of ad valorem taxes on property".

The Appellee respectfully submits that the decisions of this Court have consistently sustained the principle that a State may substitute a combination property and excise tax for a much higher straight property tax without in anywise violating the commerce clause of the Federal Constitution.

(3) Equal Protection of the Laws

The Appellant complains because the State has treated the Long Island Railroad Company as a separately operated railroad instead of a part of the Pennsylvania Railroad Company system and by so doing has compelled the Pennsylvania Railroad Company to pay higher taxes. If such were the case, it should be the Pennsylvania Railroad Company that should be making any complaint and not the Appellant. The record discloses no complaint by the Pennsylvania Railroad Company.

N. J. S. A. 54:29A-44 (Appendix A; p. 27) requires the several railroads to return to the Tax Director statements showing the net railway operating income. N. J. S. A. 54:29A-45 (App. A, p. 27) requires that the returns be sworn to. Pennsylvania Railroad Company did not include in its sworn return the operating accounts of Long Island. Since Long Island Railroad Company had ostensibly been operating independently for many years and since no claim had been made by Pennsylvania Railroad for inclusion in Pennsylvania operating accounts of Long Island Railroad deficits, the State taxing authorities had every right to rely upon the statements of the Pennsylvania Railroad Company.

There is nothing unusual about a railroad being operated separately although owned by another railroad company. The definition of system in the tax law (N. J. S. A. 54:29A-2) shows that such a situation was contemplated. The Appellant has shown that Baltimore and Ohio R. Co. which controls the Reading Railroad Company, the Reading which in turn owns the Appellant, and the Appellant each in turn carry on a separate and independent operation. They have so reported to the State as required by law. If these three independent railroad systems did not carry on separate operations and there was a tax advantage in a con-

solidated return, these companies had it within their power to submit such consolidated return duly sworn to according to law. The instant record shows no such action. The files of the Tax Department disclose no such request from these railroads or any other railroad.

But there is no similarity between the examples given by Appellant and the instant case. In those cases, the controlling company acquired control of another company, which in turn owned or leased its own property. In the instant case, the Appellant already had complete control by lease or direct ownership. It has merely leased or subleased its own property to a wholly owned subsidiary, the whole property being operated as a single system just as heretofore. In short, Appellant has merely sought to give an illusion of subdividing itself.

The importance of the New Jersey properties to the properties of the Lehigh Coal and Navigation Company was recognized by the Interstate Commerce Commission in its report (A 243A-32), wherein was said:

> "What the investment would be worth without the debtor's connecting Central division to tidewater does not appear, but preservation of this continuous route is a matter of concern to the coal company."

The State Tax Director was satisfied that the Pennsylvania properties of Appellant, were being operated as a part of the Appellant's system. The facts could lead to no other conclusion. He was required by law to determine the true net operating income. *Delaware, Lackawanna and Western R. Co. v. Division of Tax Appeals, supra,* and companion *Central Railroad Company* case. He therefore made the assessments in question on the basis of system operations.

The State Tax Director gave the same consideration to the returns of the several other railroad taxpayers. He

believes that he has made proper assessments. But even if the Director had erred in his determination as to other railroads, that cannot help this Appellant. That there might be such errors was foreseen by the Legislature. By N.J.S.A. 54:29A-25, (App. A, p. 26) the Director is given authority to correct any deficiencies. The exercise of this power is limited to 5 years by N.J.S.A. 54:29A-27 (App. A, p. 26).

Any action taken by the State Tax Commissioner based upon an erroneous factual conclusion with respect to another railroad company would not constitute a denial of equal protection of the laws to this Appellant under the 14th Amendment. In *Snowden* v. *Hughes*, 321 U. S. 1, 8 (1944), the United States Supreme Court said:

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."

and at page 9:

> "Another familiar example is the failure of state taxing officials to assess property for taxation on a uniform standard of valuation as required by the assessment laws. It is not enough to establish a denial of equal protection that some are assessed at a higher valuation than others."

and at page 11:

> "Mere violation of a state statute does not infringe the federal Constitution."

The Court cited *Owensboro Water Works Company* v. *City of Owensboro*, 200 U. S. 38 (1905), wherein the Court held that unlawful acts of a governmental agency did not constitute a violation of the 14th Amendment.

The State respectfully submits that the "railroad tax law of 1948" requiring the determination by the State Tax Commissioner of the true net railway operating income does not deny equal protection of the laws to this Appellant.

Motion to Dismiss or Affirm

Appellee respectfully submits this statement showing there is no Federal question involved and consequently a lack of jurisdiction; and further that the questions upon which the decision of this case depends are so unsubstantial as not to need further argument.

Wherefore, appellee respectfully moves the Court to dismiss this appeal, or in the alternative to affirm the judgment of the Supreme Court of New Jersey.

Respectfully submitted,

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APPENDIX A

PERTINENT SECTIONS OF RAILROAD TAX LAW

New Jersey Statutes Annotated:

54:22-1.

The state tax commissioner shall sit at Trenton on the first Tuesday of March in each year, and as often during the year and at such places as his duties may require for the purpose of ascertaining the true value, as of the first day of January preceding, of all property used for railroad or canal purposes of each railroad and of each canal company in this state, including its franchises, and he shall, in such ascertainment, ascertain:

I. The length and value of the main stem of each railroad, and of the waterway of each canal and the length of such main stem and waterway in each taxing district;

II. The value of the other real estate used for railroad or canal purposes in each taxing district in this state, including the roadbed (other then main stem), waterways, reservoirs, tracks, buildings, water tanks, waterworks, riparian rights, docks, wharves and piers, and all other real estate, except lands not used for railroad or canal purposes;

III. The value of all the tangible personal property of each railroad and of each canal company;

IV. The value of the remaining property, including the franchise.

The commissioner shall complete his valuations by the first day of November following and on or before December tenth next following he shall serve upon the treasurer of each railroad and canal company or leave at his office a statement of the assessed valuation of the property of such company in the state and of the separate valuation of the property of such company in each taxing district.

54:24-1.

The taxes which shall be assessed upon the property of railroad and canal companies, particularly described in sub-

divisions I, III, and IV of section 54:22-1 of this title, shall be assessed and levied in the manner hereinafter in this article provided.

54:24-2.

Upon his completion of the valuation of the property described in subdivisions I, III and IV of section 54:22-1 of this title, including the franchise, the commissioner shall assess such property and proceed to compute the tax thereon. The tax shall be computed upon the entire assessed valuation of such property, including the franchise, of each railroad and canal company, at the "average rate of taxation". The "average rate of taxation" shall be arrived at in the manner provided in section 54:24-3 of this title.

54:24-3.

The "average rate of taxation" shall be computed in the following manner: On or before April first in each year the assessor in every taxing district shall prepare and forward to the state tax commissioner a certificate, under his hand and seal, duly sworn to under oath, certifying to the commissioner the true value of all property, real and personal, located in his taxing district, other than the property of railroad and canal companies the taxation of which is provided for by this article, but including therein the assessed value of property of railroad and canal companies particularly described in subdivision II of section 54:22-1 of this title, and shall also certify and report the rate of taxation in the taxing district for that year. The aggregate value of all the property, real and personal, so certified, shall be deemed to be the aggregate value of the general property in the state. In each taxing district the amount obtained by multiplying the value of all the property in the taxing district by the rate of taxation therein shall be deemed to be the total taxes of the taxing district, and the aggregate of the total taxes so ascertained shall be deemed to be the aggregate taxes of the state. The "average rate of taxation" shall be computed and determined by the commissioner by dividing the aggregate taxes by the aggre-

gate value of the general property in the state. The rate so arrived at and determined shall be entered upon the records of the state tax department and shall constitute the "average rate of taxation" for that year.

54:24-6.

The money raised by the taxation of the property of railroad and canal companies, particularly described in subdivisions I, III and and IV of section 54:22-1 of this title, including the franchise, shall be applied to the uses of the state, according to law.

54:24-11.

The entire amount of tax derived from the assessment of property described in subdivision II of section 54:22-1 of this title shall be allotted to and paid over to the local taxing districts through which the railroads or canals run, giving to each district the total amount of tax that may be so derived from such property of each railroad or canal company therein.

54:29A-2.

As used in this act, unless the context clearly requires a different meaning:

"Railroad" means any common carrier by railroad engaged in, owning or constructing facilities for, the transportation of persons or property in or through this State, other than a street railway or traction company using or occupying the public streets, highways, roads or other public places, the taxation of which is otherwise provided by law.

"System" means any independently operating railroad which operates its facilities and those of one or more other railroads as a single utility for furnishing transportation service. A system shall include all companies the property of which is so operated either by virtue of control through direct or indirect ownership of a majority or more of capital stock, or under lease, trackage rights or under any other form of contract, and for which separate operating accounts are not maintained.

"Main stem" of a railroad means the roadbed not exceeding one hundred feet in width, as measured horizontally at the elevation of the base of the rail, including the full embankment or excavated area, with slopes, slope ditches, retaining walls or foundations necessary to provide a width not to exceed one hundred feet at base of rail, together with all tracks, appurtenances, ballast and all structures erected thereon and used in connection therewith, but not including passenger or freight buildings erected thereon.

"Tangible personal property" means the rolling stock, cars, locomotives, ferryboats, all machinery, tools and other tangible personal property of a railroad company, and also the locomotives and cars not belonging to such railroad company but built for its use and actually used in this State, or run under its control in this State by a sleeping car company or other company; but the rolling stock of other persons or corporations temporarily used on any such road, but not forming part of the equipment of such road, shall not be included in the term.

"Taxpayer" shall mean any person, railroad or system subject to taxation under the provisions of this act.

"Commissioner" or "State Tax Commissioner" means the director of the Division of Taxation in the State Department of Taxation and Finance.

54:29A-4.

All the property of a railroad company not used for railroad purposes shall be assessed and taxed by the same assessors, in the same manner and at the same rate as the taxable property of other owners in the same taxing district.

54:29A-7.

There is hereby levied an annual property tax upon all property used for railroad purposes which shall be assessed by the commissioner, in the manner and at the rates hereinafter provided, for the year one thousand nine hundred and forty-eight and for each year thereafter.

54:29A-9.

Tangible personal property which is used or kept but a part of the time in this State by any railroad shall be assessed such proportionate part of its value as the time it is used or kept in this State during the calendar year preceding bears to the whole year.

54:29A-12.

Property taxable under this act shall be assessed by the commissioner to each system and to each railroad not part of a system by which such property is used for railroad purposes. The assessment shall be made in the manner hereinafter provided.

54:29A-13.

An annual franchise tax is hereby levied upon all railroads operating within this State, which shall be assessed at the rate of ten per centum (10%) upon the net railway operating income of the preceding year, computed and allocated in the manner hereinafter provided, of each system and of each railroad not part of a system, subject to the maximum and minimum provisions set forth in section 20(c) hereof.

54:29A-14.

For the purpose of this article, net railway operating income shall be computed as total railway operating revenues from all sources, including any revenue whatever derived directly or indirectly from property which is used for railroad purposes, less costs of railroad maintenance, operation, depreciation and amortization, railway tax accruals, uncollectible railway revenues, rentals (both debits and credits) for equipment leased for less than one year or interchanged, and joint facility rents (both debits and credits). Deductions from operating revenues for depreciation, additions and betterments, and compensation for personal services shall be subject to regulation by the commissioner, as to reasonableness of amount and appropriateness of accounting distribution.

Depreciation and amortization charges shall in no instance, however, exceed the amounts permitted by the Interstate Commerce Commission in determining the net railway operating income of the railroad for the year under consideration.

For the purpose of determining the measure of the tax imposed by this act, net railway operating income of each system, and of each railroad not part of a system, shall be allocated to this State in the proportion that the number of miles of all tract over which the railroad or system operates in this State bears to the total number of miles of all track over which it operates.

54:29A-25.

a. Whenever the commissioner shall determine that any tax or taxes assessed pursuant to this act were less than or in excess of the amount thereof lawfully assessable, he may correct such deficiency or error by reassessing such tax, or any part thereof.

b. Whenever property subject to taxation under this act has or shall have been omitted from assessment by failure of the taxpayer to include it in a return of information, or otherwise, the commissioner may, if he finds that such property has been omitted from his assessment, cause such property to be assessed for any omitted years in accordance with the provisions of this act.

54:29A-27.

The power of the commissioner to make reassessments or to assess omitted property under this act shall be limited to the period of five years next preceding the year in which the reassessment or assessment of omitted property is made; provided, however, that assessments of omitted property by the commissioner for any year prior to one thousand nine hundred and forty-eight shall be assessed at the rate of three dollars ($3.00) per hundred of assessed valuation.

54:29A-44.

a. On or before March first in each year, every taxpayer shall return to the commissioner statements or schedules showing the character and value of all its property, as it existed on the first day of January preceding, its capitalization and its indebtedness.

b. On or before April first in each year, every taxpayer shall also return to the commissioner statements or schedules showing its railway operating revenues of the preceding year, all deductions therefrom, and the net railway operating income remaining after such deductions.

54:29A-45.

All statements and schedules required to be returned to the commissioner shall be made and prepared in such detail, and shall contain such additional information necessary or convenient for the proper administration and collection of the taxes imposed by this act, as the commissioner may by regulation prescribe. Returns made by corporations shall be sworn to by the president, vice-president or other principal officer and by the treasurer, assistant treasurer, or chief accounting officer. Whenever a receiver, trustee or assignee is operating the property or business of a taxpayer, the receiver, trustee or assignee shall make returns and tax payments in the same manner and form as are required of the taxpayer.

54:29A-74.

All other State and local taxes of or upon franchises or property used for railroad purposes, which may have been assessed for the first year in which this act becomes effective upon any taxpayer subject to taxation hereunder prior to the enactment of this act, shall abate and be canceled of record as of the effective date hereof. This act shall be construed as a revision of chapters nineteen through twenty-nine, inclusive, of Title 54 of the Revised Statutes, and nothing herein shall be construed to affect any pending litigation, nor to repeal, abate, cancel, cause to lapse or otherwise affect in any manner any assessment or the lien

or obligation to pay any taxes heretofore assessed to any taxpayer, or the legal authority to collect taxes, interest and penalties which have accrued under any provision of law repealed by this act, or under any other law, except as specifically provided in this act, or to affect the right of the State Tax Commissioner to assess omitted property, and apportion the tax so assessed, for any year prior to one thousand nine hundred and forty-one, according to the classifications and at the rates prescribed in the chapters aforesaid. Nor shall this act affect in any manner any distribution allotment or apportionment of tax receipts made or required to be made under any provision of law repealed by this act.

(9705)

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CHARLES ELMORE CROPLEY

Supreme Court of the United States

October Term, 1951

No. 520

THE CENTRAL RAILROAD CO. OF NEW JERSEY,
Appellant,

vs.

DIVISION OF TAX APPEALS, NEW JERSEY STATE DEPARTMENT OF TAXATION AND FINANCE, *et al.*,
Appellees.

Appeal from the Supreme Court of New Jersey

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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Appeal from the Supreme Court of New Jersey

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Preliminary Statement

The statement of the State of New Jersey of matters and grounds making against jurisdiction, and its motion to dismiss or affirm ignore the following important matters:

The Trustees in Bankruptcy of Appellant submitted to the bankruptcy court as a necessary step in its reorganization a plan to segregate the bankrupt's properties into two separate operating class I railroads, (1) Central Railroad Company of Pennsylvania,* and (2) The Central Railroad Company of New Jersey.† The bankruptcy court approved

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* Hereinafter sometimes referred to as CRP.

† Hereinafter sometimes referred to as CNJ.

this plan, subject to the permission of the Interstate Commerce Commission. The Interstate Commerce Commission, on application of Central Railroad Company of Pennsylvania to lease the lines of railroad in the Commonwealth of Pennsylvania, granted such permission, after a full hearing, as in the public interest. The State of New Jersey, by its Attorney General, appeared and objected to both said applications, on the ground that one of the purposes of the separation was to make the earnings of the property in Pennsylvania not subject to taxation by New Jersey, so that the State's revenues would be adversely affected (Ap. 231a-13; 241a-35 to 242a-10).* As to this, the Interstate Commerce Commission, in the report of its Division 4 (Ex. CR-8), said:

> "This is a proper objective, if accomplished in a lawful manner, the Supreme Court of the United States having said in *Gregory* v. *Helvering*, 293 U. S. 465, at page 469, that the legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted" (Ap. 244a-10 to 20).

After having evinced such great concern over the possible tax consequences of Appellant's reorganization plan, before the Bankruptcy Court and the Interstate Commerce Commission, it is respectfuliy submitted that the State of New Jersey is now in no position to assert that the questions presented by this appeal are so insubstantial as to permit of their disposition without a plenary hearing by this Court.

Likewise, the State, in its motion, completely ignores the fact that since the complete separation of CRP from CNJ on August 5, 1946, both railroads have maintained completely separate organizations and have separately

* All Appendix references are to Appellant's Appendix below, which has been sent up as part of the Record.

accounted each year to the Interstate Commerce Commission, as separate and distinct Class I interstate steam railroad carriers, as required by the Transportation Act of 1920. The State completely ignores the fact that in each of the years under consideration, CNJ operated at a deficit, and that it was only through the arbitrary application of the statutory all-track mileage formula, ignoring the separate corporate existence and operation of Central Railroad Company of Pennsylvania, treating the two corporations as they existed prior to the separation on August 5, 1946, and lumping the net railway operating deficits of the CNJ with the net railway operating income of the CRP, that the State was able to assess, levy and collect the franchise taxes from which this appeal was taken. The State's motion asks the Court to dismiss the appeal without giving Appellant an opportunity to be heard, merely because, as it claims, the taxes assessed under the new Railroad Tax Act of 1948 are less than they would have been had they been assessed under the Act of 1888, which has long since been repealed. It asks this Court to determine that the taxes assessed against Appellant are valid merely because Appellant operates a railroad in New Jersey which does an important and necessary transportation business and has a valuable waterfront terminal in Jersey City.

The "great value" of these New Jersey properties to which the State refers, can best be measured by the terrific operating deficits of Appellant. Since it is axiomatic that property is worth no more than it can earn, *Southern Railway Co.* v. *Kentucky*, 274 U. S. 76 (1927), it would seem to be proved that the New Jersey properties are not worth anywhere near what the State contends, for the profits from an efficient freight operation are consumed by severe losses in carrying thousands of New Jersey commuters daily and by the heavy State taxes.

POINT I

That this Court Has Jurisdiction Cannot be Doubted.

The State of New Jersey contends that this Court does not have jurisdiction because Appellant does not attack the statute as being unconstitutional *in toto* but merely as being unconstitutional as construed and applied. This contention flies in the face of decisions of this Court, commencing with *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 (1921), which uphold the jurisdiction to review on appeal a claim that a statute is unconstitutional in a particular application.

The State also cites *Charleston Fed. Sav. & Loan Ass'n* v. *Alderson*, 324 U. S. 182 (1945). That case is entirely distinguishable from the one at bar. In that case the appellant had merely claimed below that the *assessment* of taxes was unconstitutional, as denying equal protection; the appellant had failed to claim that the inequality resulted from construction of the taxing statute. In the case at bar, the Appellant has at every stage directed its complaint against the statute as construed and applied, and not merely against the action of the assessing officials.

What is more, the *Alderson* case actually is an authority in support of jurisdiction in the instant case. In that case, the Court said:

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal."

As we have already pointed out in the Jurisdictional Statement, the *opinion* of the Supreme Court of New Jersey clearly shows that that Court was distinctly passing upon a claim by Appellant that the *statute* was unconstitutional.

POINT II

The Contention that Appellant Pays a Comparatively Small Total Tax is as Irrelevant as it is Inaccurate.

The Respondent's Statement Opposing Jurisdiction presents certain figures designed to create the impression that the appellant pays total taxes amounting to less than 2% of the value of its property used for railroad purposes in the State of New Jersey. At best in a case of this kind such a tactic is merely irrelevant; in the case at bar, however, it is little short of meretricious. The present appeal involves the validity of a *mode* of taxation and not of the amount of a particular tax assessment. If this Court were to sustain the present method of assessing taxes against the Appellant, the Legislature might thereafter raise both the franchise tax and property tax rates to an oppressive level, and the Appellant would be without recourse. As was said by this Court in *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550 (1935):

> "Ignoring the glaring inequalities of burden resulting from the statute, the appellees tell us that if and when the load becomes too heavy upon any taxpayer he may with confidence invoke the Fourteenth Amendment. The position seems to be that different principles govern various forms of taxation, and that what has been held with respect to the unrestricted power of a legislature to determine the amount to be exacted by other forms of taxation has no application to an excise. We are unaware of any such distinction in logic and the authorities sanction none. Every taxing law must pass the constitutional test applied by the courts to the method of imposition, but the measure of the impost rests in the discretion of the legislature.

> "* * * Once the lawfulness of the method of levying the tax is affirmed, the judicial function ceases. He deludes himself by a false hope who supposes that if this court shall at some future time conclude the burden of the exaction has become inordinately oppressive, it can interdict the tax."

Furthermore, the computations set forth in the State's motion are inaccurate and misleading. In making these computations the State has omitted the very important item of taxes on class II property. Class II property consists for all practical purposes of yard and terminal facilities, and they are assessed at full value and taxed by the State for the use of the municipality in which located. Under the 1947 Constitution such property must be taxed at the local tax rate. The assessment sheets for the years in question show that the Appellant paid the following taxes upon its class II property:

1948 (Ap. 10a)	$2,571,118.99
1949 (Ap. 20a)	$2,244,538.86
1950 (Ap. 31a)	$2,287,729.76

The assessment sheets also show that the total taxes paid by Appellant in the years under review were as follows:

1948 (Ap. 10a)	$3,222,829.61
1949 (Ap. 20a)	$3,126,802.11
1950 (Ap. 31a)	$3,014,443.44

The record therefore shows that during the years 1948, 1949 and 1950 the Appellant paid total taxes to the State

of New Jersey which averaged over $3,000,000. per year. The record also suggests that during those years the New Jersey operations of the Appellant produced an average *gross* revenue of about $39,000,000. in each year. This figure for gross revenue is approximately the same whether we consult the I. C. C. Form A accounts filed by the Appellant or the allocation of "system" gross revenue on an all-track mileage basis made by the State in the assessment sheets. Compare, *e. g.*, Exs. CR-10 and 11, Ap. 264a and 276a with Assessment Sheets, Ap. 8a, 18a and 29a. For, as we have pointed out in the Jurisdictional Statement, the analytical accounts submitted by the Appellant divide the gross "system" revenue between CNJ and CRP in approximately the same proportion (67%) as does the state's allocation formula. It is therefore apparent that in each of the years here in question the Appellant has paid to the State of New Jersey total taxes amounting to over 7% of its gross revenue earned from railway operations carried on within or attributable to the State of New Jersey. What is more significant and serious is that in each of the years in question the total taxes payable to New Jersey alone consumed at least 75% of the net revenue from railway operations (before taxes) of the CNJ as shown by its Form A report to the I. C. C. (*e. g.*, Exs. CR-10 and 11, Ap. 264a-5 and 276a-5). Under these circumstances it can hardly be said that the Appellant does not pay a heavy tax to the State of New Jersey.

POINT III

The New Jersey Railroad Franchise Tax is not an "In Lieu" Tax.

The State of New Jersey contends that the Appellant is without standing to assert its rights under the Due Process and Commerce clauses for the reason that the present levy is assessed in lieu of a superseded *ad valorem* property tax which would have been greater in amount. The State thus seeks to bring the instant case within the doctrine, laid down in *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688 (1895), that a tax unconstitutional in form may be validated upon the showing that it is actually a substitute for, and not disproportionate in amount to, an *ad valorem* levy. This, however, is an erroneous view of the tax involved here.

The principal fault in the State's argument on this point is that it insists upon speaking of the present case as though it arose under the Railroad Tax Law of *1941* (P. L. 1941, c. 291),* whereas in fact the Appellant has been assessed under, and attacks the validity of, the Railroad Tax Law of *1948* (P. L. 1948, c. 40). Under the 1941 law there was perhaps some color to the claim that the franchise tax was a property tax in its nature, since under that law the franchise tax base was computed by capitalizing the net railway operating income and deducting from the capitalized value thereof the assessed value of all tangible property taxed on an *ad valorem* basis (P. L.

* A good deal of confusion may arise from the fact that no less than three New Jersey Railroad Tax Laws have been discussed—the Laws of 1888 (repealed), 1941 (amended), and 1948. The Attorney General neglected to point out with sufficient clarity that the first six statutory sections quoted in the Appendix to his Motion are from the repealed Act of 1888.

1941, c. 291, §§13 to 15). Furthermore, the 1941 Law expressly provided that the Franchise Tax was to be an "in lieu" tax. Thus, in Section 13:

> "This tax shall be in lieu of any other tax or taxes of or upon such franchises" (P. L. 1941, c. 291, §13).

The 1948 Law, however, introduced sweeping changes in the franchise tax scheme. For one thing, the Legislature completely eliminated the provision that the franchise tax should be in lieu of other taxes upon the same subject. N. J. S. A. Supp. 54:29A-13. For another, the franchise tax is now assessed at a stated percentage of the net railway operating income itself, without any reference to the capitalized value of such income or the value of tangible property taxed *ad valorem*. N. J. S. A. Supp. 54:29A-13. It is in form a tax measured by the net railway operating income.

In addition to this, the railroad's tangible property is taxed at its true value, either at the statutory rate for the use of the state or at the local rate for the use of the municipality in which the property is located. N. J. S. A. Supp. 54:29A-4, 16 to 24. What is more, in the assessment of tangible property there is no attempt made to allow for the fact that there is a specific tax on the franchise, since the tangible property is assessed at the value which it derives from its actual use as a part of a going railroad concern. *Pitney* v. *Kelly*, 21 N. J. Misc. 405, 422, 34 A.2d 547, 556 (St. Bd. of Tax App. 1943); *Erie R. R. System* v. *Walsh*, 26 N. J. Misc. 81, 94, 57 A.2d 217, 225 (Div. Tax App. 1948). It is well recognized in the law of New Jersey that a valuation which takes account of the going concern value of property is in effect taxation of the property value of the corporate franchise itself. *Long Dock Co.* v. *St. Bd. of Assessors*, 78 N. J. L. 44,

73 Atl. 53 (Sup. Ct. 1909), *aff'd* 79 N. J. L. 604, 80 Atl. 1135 (E. & A. 1910). It is quite obvious therefore that the franchise tax is in addition to, and not in substitution for, *ad valorem* taxes upon all of the property of the Appellant *including an ad valorem tax upon the franchise itself.*

Under these circumstances the *Postal Telegraph* doctrine is inapposite. The holding of the *Postal Telegraph* case is that the validity of the tax depends upon its true character as a property tax in fact and upon the appropriateness of the tax base as a substitute for *ad valorem* taxation. The comparison of the amounts payable under a straight property tax and under the tax said to be in lieu thereof is intended merely as a test to show the reasonableness and appropriateness of the substitute measure.

This Court has repeatedly and dramatically held that a tax upon income cannot fall within the protection of the "in lieu" doctrine when it is assessed in addition to an *ad valorem* tax. Thus, during the October term, 1911 the Court upheld the Minnesota gross receipts tax, *U. S. Express Co.* v. *Minnesota,* 223 U. S. 335 (1912), while on the very same day the Court struck down as invalid the gross receipts tax of the State of Oklahoma, *Meyer* v. *Wells, Fargo, & Co.,* 223 U. S. 298 (1912). The difference was that the Oklahoma tax was in addition to general property taxes, while the Minnesota gross receipts tax was a complete substitute for any and all *ad valorem* levies.

In *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450 (1918) the Court was once again called upon to discuss the principles of "in lieu" taxation. The Court said:

> "• • • A short reference to two recent cases in which the earlier decisions were reviewed will leave little to be said in solving the question here. We refer to Meyer v. Wells, F. & Co., 223 U. S. 298, 56 L. ed. 445, 32 Sup. Ct. Rep. 218, and United States Exp. Co. v.

Minnesota, 223 U. S. 335, 56 L. ed. 459, 32 Sup. Ct. Rep. 211, both decided on the same day. The former involved a tax in Oklahoma of a stated per cent of the gross receipts of an express company doing both a local and an interstate business in that state. The statute called the tax a 'gross revenue tax', and declared that it was to be 'in addition to the taxes levied and collected upon an ad valorem basis upon the property and assets' of the company. We held that the tax could not be sustained as a tax on the gross earnings, they being partly derived from interstate commerce, and also held that it could not be regarded as a property tax because, as the statute disclosed, all the property of the company in the state was to be reached and valued in another way. The other case involved a tax in Minnesota of a designated per cent of the gross earnings of an express company from business done in that state, the business being partly local and partly interstate commerce. The statute declared that the tax was to be in lieu of other taxes on the company's property, and the state court held that it was not in reality a tax on the gross earnings, but was a tax on the property, the earnings being taken merely as a measure of the value of the property for taxing purposes. We accepted and gave effect to that holding, not as being conclusive on us, but on the grounds that the property from which the earnings were derived was not to be otherwise taxed, that the tax was part of a system intended to reach the full value of the company's property in the state as reflected by the gross earnings, and that the amount of the tax did not appear to be in excess of what would be legitimate as an ordinary tax on the property, valued with reference to its use as part of a going concern. The case dealing with the Oklahoma tax was distinguished by pointing out that that tax could not be regarded as a property tax, because it was to be in addition to another tax reaching the full value of the company's property in the state."

The State also argues that the tax here in question is justifiable for the reason that the valuable terminal facilities of the Appellant are located within the State of New Jersey. He cites in support of that contention cases such as *Fargo* v. *Hart*, 193 U. S. 490 (1904) and *Wallace* v. *Hines*, 253 U. S. 66 (1920). Those cases establish the principle that the mileage of a railroad in any one state may not be valued on a uniform basis with the portions in other states when the portions in those other states are evidently more valuable and have a greater income producing power; or where the value sought to be distributed uniformly over the line has no connection whatsoever with railroad operations. Those authorities are beside the mark in the case at bar for the reason that the exchange value of the Jersey City terminal and yard properties has no relation whatsoever to the question of whether or not the operations of the Appellant within the State of New Jersey are profitable. It is undoubtedly true that the Jersey City properties have a great exchange value. They could be sold for industrial uses, and, as we have shown above, they are already assessed and taxed at their full exchange value. But the State, in asserting that these facilities justify the imposition of the present franchise tax, is confusing the two senses of the word "value". This word may mean exchange value—*i. e.*, the worth of property to those who can put it to its highest or best use, or it may mean capitalized value—*i. e.*, the worth of property as measured by its income-producing power in its present uses. The State adduced no evidence to show that the Jersey City terminals as now used have a high income-producing value. In fact all of the evidence in the record is to the contrary. The I. C. C. Form A reports show that the use of the said terminals in the operation of the CNJ is extremely unprofitable. The record establishes that a substantial portion of the income of CRP is derived from

operations with which the CNJ has no connection whatsoever—operations such as the handling of freight shipments coming from the west and south and terminating at points in Pennsylvania, or the forwarding of freight in direct interchange with such lines as the Delaware & Hudson, the Lehigh & Hudson, the Pennsylvania and others (Exs. S-7, 8, 9 and 10). In fact, only 15% of CRP's train crews are employed in joint through service with CNJ (Ap. 163a-10 to 40). The record also shows that if the CRP were not affiliated with CNJ, and were to use other roads as preferred interchange carriers, then CRP would earn almost as much money as it actually does today (Ap. 129a-30 to 131a-30; Ex. CR-33). These facts being so, the State's reference to the value of the terminal properties is irrelevant. The New Jersey railroad franchise tax does not purport to be based upon the value of property. It purports to be based upon the actual income from operations. The record shows that the operations of CNJ in New Jersey are unprofitable. There is nothing which can change this fact. There is nothing which the State can say to justify the imposition of a tax upon income earned outside of the State.

POINT IV

The New Jersey Railroad Tax Law as Construed and Applied below Denies to Appellant Equal Protection of the Law.

The State's brief attempts to answer Appellant's charge of violation of the Equal Protection clause by asserting that the present case contains no evidence of an intentional or systematic discrimination. Evidence of such discrimination is abundantly present; and in fact some

of it may be found in the very papers filed in this Court by the Attorney General himself.

The State's motion says that the other railroads described in the Jurisdictional Statement as being similarly situated to the Appellant were accorded different tax treatment for the reason that, in their sworn reports they did not treat their subsidiaries as being part of their respective systems. Thus "Pennsylvania Railroad Company did not include in its sworn return the operating accounts of Long Island". If the taxing authorities honestly treat the sworn return of the taxpaying railroad as the basis for exclusion from system tax treatment, then the State's own brief gives evidence of systematic discrimination. The Appellant filed the same sworn return as did the Pennsylvania; the Appellant similarly did not include in its return the accounts of its subsidiary; yet the Appellant was taxed on the basis of its subsidiary's income while the Pennsylvania was not.

The State also attempts to evade the issue of discrimination by suggesting that if mistakes in assessment have been made there is a state-law remedy available for their correction. This suggestion however is wide of the mark, for the State's brief has made no plausible effort to explain why, in each and every case, as well where the subsidiary is excluded from the parent's system as where it is included, the result is favorable to the tax collector and never to the taxpayer. This remarkable coincidence, standing alone, should be enough to show that the inequality of treatment complained of is systematic and deliberate.

And this evidence is reinforced and fortified by the failure of the State to explain away the similarity between the case of the Appellant and the other cases described in which the parent and the subsidiary were not treated as a single system for tax purposes. The

Appellant has given facts concerning the Pennsylvania-Long Island, the B. & O.-Reading and the Pennsylvania-Penn-Reading Seashore connections. Those facts show that these situations are identical in principle with the one at bar. In reply the Attorney General does not even attempt the marshaling of evidence to refute the Appellant's claim. He merely brushes the whole question aside with the general statement that in the other cases the subsidiaries are "separately operated". What facts show that they are separately operated? What differences are there in the operating set-ups? What differences are there in the accounting procedures? What differences are there in the manner of transportation service provided? If there were any material difference between the present case and the other cases described by the Appellant, the State certainly ought to be able to give some lucid and detailed explanation of the difference in tax treatment.

In attempting to distinguish the present case from the other examples given by Appellant, the State's brief says that in the other cases the parent acquired control of a subsidiary which already owned its own property whereas here the parent not only created the subsidiary but also gave it its property. Such an attempted distinction is futile. First, because it is immaterial. The Attorney General has always insisted, and the Supreme Court of New Jersey has held, that the criterion for differences in tax treatment under the law of New Jersey is the difference in the manner in which the taxable property is used. If this is so, it is immaterial how it was *acquired*. A parent railroad may have the same operating relationships with its subsidiary whether it acquired the subsidiary full-blown or whether it created it.

If, however, the manner of acquisition were important, the State then fails to explain the difference between the Appellant and the Penn-Reading Seashore Lines.

As we have shown in the Jurisdictional Statement Penn-Reading was created by an agreement between its parent companies, and acquired all of its property from them. Yet, the Penn-Reading is taxed as a separate entity and not as part of the Pennsylvania Railroad system.

The State is unable to show why the other carriers similarly situated to the Appellant were given different tax treatment, because the only plausible explanation is that there was intentional discrimination. Where the subsidiary operates at a profit it is included in the "system". Where the subsidiary operates at a deficit it is excluded.

The tax, however, purports to be levied upon the franchise—that is to say, upon the privilege of carrying on the business of railroading within the state. In this very case the Supreme Court of New Jersey has judicially declared that the criterion for discrimination among taxpayers is the manner in which property is used. Effectually, however, the present decision would add another requirement—namely, that the property must have been acquired in a certain way. Thus, A and B might utilize their properties in exactly the same manner and for exactly the same purposes. Yet A would be taxed and B would go free, simply and solely because of a difference in the manner in which each acquired his property. Such a principle of classification is completely irrational and arbitrary, and the Appellant is protected against it by the Equal Protection clause.

Up to this point we have assumed, along with the State, that it is necessary for the Appellant to show actual and intentional discrimination in order to prevail. Actually, that assumption is entirely unfounded. In the present case the Appellant is not attacking one specific act of state officials as being discriminatory. Appellant is attacking a *construction* of a state statute which results

in arbitrary and irrational classification among similarly situated taxpayers. In such cases the irrationality alone need be shown and the Court is unconcerned with the intention or motive of the state agencies which so construe the law. *E. g., Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562 (1949); *Stewart Dry Goods Co.* v. *Lewis, supra; Hartford Steam Boiler Ins. Co.* v. *Harrison*, 301 U. S. 459 (1937).

Conclusion

For the foregoing reasons and as well for the reasons set forth in the Jurisdictional Statement, Appellant respectfully urges that the motion of the State of New Jersey to dismiss or affirm be denied.

Respectfully submitted,

James D. Carpenter,
Attorney for and of Counsel with Appellant,
75 Mortgomery Street,
Jersey City 2, N. J.

Judson C. McLester, Jr.,
Elmer J. Bennett,
Milton A. Dauber,
On the Brief.

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JAN 23 1952
CHARLES ELMORE CROPLEY

State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY

THEODORE D. PARSONS
ATTORNEY GENERAL

DIVISION OF LAW
STATE HOUSE
TRENTON 7

January 16, 1952

Honorable Charles Elmore Cropley
Clerk, Supreme Court of the United States
Washington 13, D. C.

Re: The Central Railroad Co. of New Jersey, Appellant,
v.
Division of Tax Appeals, et al., Appellees.
No. 520

Dear Mr. Cropley:

The State of New Jersey has just been served with copies of brief of the appellant opposing the motion to dismiss or affirm in the above entitled matter. The brief states at page 9:

> "For one thing, the Legislature completely eliminated the provision that the franchise tax should be in lieu of other taxes upon the same subject. N.J.S.A. Supp. 54:29A-13."

This is not a correct statement.

The "Railroad Tax Law of 1941" was amended in 1948, the law as amended becoming the "Railroad Tax Law of 1948". Section 17 thereof (P.L. 1948, ch. 40, p. 123; N.J.S.A. 54:29A-74.1) provides in part as follows:

> "The taxes imposed by this act shall be in lieu of all other State and local taxation of or upon franchise and property used for railroad purposes. * * *"

The State of New Jersey realizes that there must be an end to the argument permitted in such matters, particularly on motion such as in the instant case. Nevertheless, the State

does not feel that such a complete disregard of the pertinent statutory provisions should be permitted to go unchallenged. It is therefore respectfully requested that, if possible, the above information be presented to the Supreme Court as an addendum to the statement of the State making against jurisdiction or, if this may not be done, such information may be brought to the attention of the Court in some other appropriate manner.

A copy of this letter is being sent to James D. Carpenter, Esq., Attorney for and of Counsel with Appellant.

Yours very truly,

Theodore D. Parsons
Attorney General

By Benjamin C. Van Fine
Benjamin C. Van Fine
Deputy Attorney General
Of Counsel with Appellee,
State of New Jersey.

COPY

CARPENTER, GILMOUR & DWYER
75 MONTGOMERY STREET - JERSEY CITY 2, N. J.

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FILED
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CHARLES ELMORE CROPLEY
CLERK

January 18, 1952

Hon. Charles Elmore Cropley, Clerk,
Supreme Court of the United States,
Washington 13, D. C.

Re: The Central Railroad Co. of New Jersey, Appellant vs.
Division of Tax Appeals, et al., Appellees,
No. 520

Dear Mr. Cropley:

I have just received a copy of a letter addressed to you in the above entitled matter by the Attorney General of the State of New Jersey under date of January 16, 1952, in which he states that the following statement, appearing at Page 9 of our brief opposing the motion to dismiss or affirm, is not correct:

> "For one thing , the Legislature completely eliminated the provision that the franchise tax should be in lieu of other taxes upon the same subject. N.J.S.A. Supp. 54:29A-13."

The Attorney General bases his statement on the following provision, which he quotes from Section 17 of the "Railroad Tax Law of 1948":

> "The taxes imposed by this act shall be in lieu of all other State and local taxation of or upon franchise and property used for railroad purposes. * * * "

I was fully aware of the provision which the Attorney General has quoted from Section 17 of the "Railroad Tax Law of 1948" when I filed my said brief, and I have reexamined it since receiving the Attorney General's letter, and I remain of the opinion that there is no provision in the "Railroad Tax Law of 1948" to the effect that the franchise tax imposed on railroads by Section 13 of that law is in lieu of all other taxes on the franchise.

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CARPENTER, GILMOUR & DWYER
75 MONTGOMERY STREET - JERSEY CITY 2, N. J.

 January 18, 1952

If the Attorney General's letter should be brought to the attention of the Supreme Court in any manner, I request that this letter also be brought to the Court's attention.

A copy of this letter is being sent to Benjamin C. Van Tine, Deputy Attorney General of the State of New Jersey, attorney for and of counsel with appellees.

Respectfully yours,

James D. Carpenter

JAMES D. CARPENTER

JDC:dff